

Albert K. Walsh (Wyo. Bar # 7-5869)
M. Gregory Weisz (Wyo. Bar # 6-2934)
Pence and MacMillan LLC
501 Garfield
P.O. Box 1285
Laramie, WY 82073
Telephone: 307-745-3626
awalsh@penceandmac.com
Attorneys for Plaintiff

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING
2019 AUG -8 PM 2:14
STEPHAN HARRIS, CLERK
CHEYENNE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

HOWARD R. WHITTECAR,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
VETERANS AFFAIRS, and ROBERT WILKIE,
in his official capacity as Secretary of the Dept. of
Veterans Affairs, and JAMES BYRNE, in his
official capacity as General Counsel of the Dept.
of Veterans Affairs

Defendants.

Civil Action No. 19-cv-164-S

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW, Howard R. Whittecar, (hereinafter "Plaintiff") by and through his attorneys, Albert K. Walsh and M. Gregory Weisz of Pence and MacMillan LLC, and files the following complaint against the United States Department of Veterans Affairs (hereinafter, "VA"), Robert Wilkie, in his official capacity as the Secretary of the United States Department of Veterans Affairs, and James Byrne, in his official capacity as the General Counsel of the

United States Department of Veterans Affairs (hereinafter “Office of General Counsel”), hereinafter collectively referred to as “Defendants,” for violations of the Freedom of Information Act (hereinafter “FOIA”), 5 U.S.C. § 552, and states as follows:

I. Parties, Jurisdiction, and Venue

1. This case presents a federal question under FOIA. The VA denied the Plaintiff an earlier effective date for his disability compensation from a service-connected medical condition. In order to properly appeal this denial, Plaintiff requires a copy of his complete records from the VA so that he knows what information was before the VA when it made its decision denying him benefits. To accomplish this, he filed a FOIA request which the VA denied. The VA’s action in denying Plaintiff’s FOIA request was arbitrary and capricious: the VA denied Plaintiff’s records request by claiming that giving Plaintiff his own records would constitute an invasion of his privacy. Having exhausted his remedies before the VA, Plaintiff now files this *Complaint*.

2. This case presents a federal question that arises under FOIA, therefore this Court has subject matter jurisdiction under 28 U.S.C. § 1331.

3. The Court has jurisdiction over the parties under 5 U.S.C. § 552(a)(4)(B) because the Plaintiff is a resident of this District.

4. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1) because the Defendants are officers or employees of the United States, the Plaintiff resides in this District, and no real property is involved in this action.

II. Relevant Law

5. FOIA requires United States government agencies to promptly make records available to any person if that person makes a request which: (1) reasonably describes the records sought and (2) complies with any applicable agency rules for making such a request. 5 U.S.C. § 552(a)(3)(A).

6. A record is “any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.” 5 U.S.C. § 552(f). The VA definition of a record includes documents, and information contained in or derived from documents regardless of the format in which the documents are kept. 38 C.F.R. § 1.551.

7. Any person may obtain a complete copy of their own records from the VA. 38 C.F.R. § 1.577(a), (f).

8. Any person seeking benefits from the VA may be represented by an accredited attorney upon submission of a completed VA Form 21-22a. 38 C.F.R. §§ 14.629. VA Form 21-22a is also the document which grants authority to disclose a claimant’s information to an accredited attorney. 38 C.F.R. § 14.631.

9. The VA has few requirements for a request for records other than the request be in writing and reasonably describe the records sought. 38 C.F.R. § 1.554.

10. Upon receiving a FOIA request, an agency must notify the requestor of its determination regarding a FOIA request within twenty (20) business days. 5 U.S.C. § 552(a)(6)(A)(i).

11. If a request is denied, the VA requires a requestor to appeal to the Office of General Counsel before seeking judicial review. 38 C.F.R. § 1.559(f). The Office of General Counsel

must notify the requestor of its determination within twenty (20) business days after the receipt of such appeal. 5 U.S.C. § 552 (a)(6)(A)(ii).

12. Upon exhausting administrative remedies, a requestor may seek judicial review. In such an action, the Court reviews the agency's actions *de novo* and the agency has the burden to justify its refusal to produce the requested records. 5 U.S.C. § 552(a)(4)(B).

13. The Court has authority to award reasonable attorney fees and other litigation costs reasonably incurred by a plaintiff who succeeds in challenging a denied FOIA request. 5 U.S.C. § 552(a)(4)(E).

14. Additionally, the Court has authority to issue findings which question whether the agency acted in an arbitrary and capricious manner, which in turn shall cause a Special Counsel to investigate the circumstances surrounding the FOIA denial. 5 U.S.C. § 552(a)(4)(F).

III. Facts Common to All Claims

15. Plaintiff is a Veteran of the United States Navy and has been rated as 100% disabled by the VA for a service-connected medical condition. However, Plaintiff sought, and was denied, an earlier effective date for his disability rating. Thus, Plaintiff must decide whether to appeal this denial of benefits to the Board of Veterans Appeals by April 2, 2020.¹

16. With the intention of appealing this denial of an earlier effective date for benefits, Plaintiff engaged and appointed the undersigned counsel as his Representative in the one and

¹ Veterans typically have one year to appeal VA decisions regarding claims for benefits. 38 U.S.C. § 5104C(a). On the surface, this time frame seems more than adequate. However, as the present case illustrates, even Veterans who aggressively seek their records face obstacles lasting many months before they can perform what is essentially basic discovery.

only way the VA allows; by completing VA Form 21-22a (as required by 38 C.F.R. §§ 14.629, 14.631). *VA Form 21-22a*, Exhibit 1.

17. Knowing that a review of Plaintiff's VA records would be critical to an appeal of the VA decision denying Plaintiff benefits, Plaintiff authorized his Representative (undersigned counsel) to make a FOIA request on his behalf in order to receive all of his VA records. *Initial FOIA Request*, Exhibit 2.

18. This request complied with 5 U.S.C. § 552(a)(3)(A) and 38 C.F.R. §1.554 in that:

- a. it was in writing;
- b. it was clearly marked as a Freedom of Information Act request;
- c. it provided a detailed description of the records sought; and
- d. it included a fully executed VA Form 21-22a making it clear Plaintiff's counsel's had authority to act on behalf of the Plaintiff and the authority to receive his records. *Initial FOIA Request*, Exhibit 2, pp. W 0005, 08–09.

19. The VA responded with a form letter which denied this request under 5 U.S.C. § 552(b)(6) by taking the illogical and irrational position that it would be a clearly unwarranted invasion of the Plaintiff's personal privacy if his VA records were disclosed to the very person he appointed to be his Representative in a VA benefits appeal. *Initial Denial*, Exhibit 3, p. W 0011.

20. In reaching this conclusion the VA arbitrarily failed to acknowledge:

- a. The very first paragraph of the *Initial FOIA Request* which clearly stated the request was made "on behalf of" the Plaintiff, and that "the Plaintiff has appointed

[the undersigned] as his representative as shown in the attached VA Form 21-22a.” *Initial FOIA Request*, Exhibit 2, p. W 0005;

- b. that the Initial FOIA request included a fully executed VA Form 21-22a, **which is the only method by which the VA allows an attorney to represent a veteran before the VA.** *Initial FOIA Request*, Exhibit 2, pp. W 0008–09;
- c. that VA Form 21-22a contains the following language in the section marked Conditions of Appointment: “I authorize VA to release any and all of my records (other than as provided in Items 19 and 20) to that individual appointed as my representative.” *VA Form 21-22a*, Exhibit 1, p. W 0002; and
- d. that Plaintiff’s specific VA Form 21-22a contained no restrictions whatsoever listed in items 19 and 20. *VA Form 21-22a*, Exhibit 1, p. W 0002.

21. In addition to its failure to acknowledge the previously-mentioned details, the VA had capriciously claimed that it “thoroughly considered” Plaintiff’s FOIA request. *Initial Denial*, Exhibit 3, p. W 0011.

22. In a moment of unintentional candor, the real reason for the FOIA denial was made clear in the second bullet point on the *Initial Denial* where the VA stated: “unlike FOIA, the Privacy Act does not impose a time for agency responses.” *Initial Denial*, Exhibit 3, p. W 0010.

23. The VA offers an alternate dispute resolution channel for FOIA requests. *Initial Denial*, Exhibit 3, p. W 0012.

24. Because the VA’s error was so obvious, Plaintiff elected to attempt this channel by emailing, calling, and ultimately sending a letter to the VA FOIA Public Liaison. *Liaison Letter*, Exhibit 4.

25. However, Plaintiff received no response and therefore timely served his FOIA appeal on the Office of General Counsel on June 19, 2019. *FOIA Appeal*, Exhibit 5.

26. After the Office of General Counsel supposedly “thoroughly reviewed [the] submission under the provisions of FOIA,” the General Counsel denied Plaintiff’s FOIA appeal by upholding the VA’s decision that Plaintiff’s request for his own records was a clearly unwarranted invasion of the Plaintiff’s personal privacy under 5 U.S.C. § 552(b)(6). *Appeal Denial*, Exhibit 6, p. W 0044 (stating “FOIA Exemption 6 protects records the release of which would lead to a clearly unwarranted invasion of personal privacy”).

27. Going further, despite Plaintiff’s request for his own records, the Office of General Counsel stated “you have not identified a public interest in the information Under the circumstances, the balance weighs in favor of protecting the Veteran’s privacy interest in his VA records.” *Appeal Denial*, Exhibit 6, p. W 0045.

28. This second form letter denial contains the same errors as previously stated in paragraph 20 above. *Appeal Denial*, Exhibit 6.

29. The section under the heading “Analysis” contains no actual analysis and leaves no doubt whatsoever that the Office of General Counsel did nothing more than copy and paste its response from its last Exemption 6 denial letter. *Appeal Denial*, Exhibit 6, p. W 0044–45.

30. By failing to discuss that the initial records request—and the appeal too—was made on behalf of Plaintiff, and by failing to even note the fully-executed VA Form 21-22a, the “Analysis” is at best incomplete. But, taking the denial at face value, the VA blatantly ignored the substance of the FOIA request and falsely asserted that Plaintiff’s Representative was not acting as the Plaintiff’s Representative. In doing so, the VA then took the utterly illogical,

indefensible, and irrational position of purporting to protect the Plaintiff from invading his own privacy. *Appeal Denial*, Exhibit 6, p. W 0044–45.

31. Such denials from the VA and the Office of General Counsel raise serious questions about whether anyone at the VA ever even read Plaintiff's records request, and whether the VA tried to buy itself time so that it can take more than 20 days to respond to a valid FOIA request. It is difficult to imagine an action that is more arbitrary and capricious.

IV. First Cause of Action: Violation of the Freedom of Information Act

32. Plaintiff incorporates the allegations in paragraphs 1–31 as if fully set forth herein.

33. FOIA required the VA to provide Plaintiff with copies of his own records within 20 days, which the VA refused to do.

34. The VA's denial was clearly improper in that it utterly disregarded the content of the request, arbitrarily and unilaterally declared that Plaintiff's attorney was seeking the documents for an unnamed public purpose, and then determined that providing documents to Plaintiff's Representative would be a clearly unwarranted invasion of the Plaintiff's own privacy under 5 U.S.C. § 552(b)(6). *Initial Denial*, Exhibit 3.

35. At no point did the VA acknowledge that Plaintiff had properly appointed a Representative, despite being served with a fully-executed VA form 21-22a. It is difficult to overstate the egregious nature and depth of the VA's error:

- a. The VA created the very form it requires veterans to use to appoint a representative to make records requests—VA Form 21-22a;
- b. every word in VA Form 21-22a was put there by the VA;

- c. the VA created this form for the sole and specific purpose of allowing a claimant to appoint a representative;
- d. the VA requires claimants and attorneys use this form: there is no other way for the VA to acknowledge a claimant has appointed an attorney as his representative;
- e. the VA wrote the language in the form that clearly articulates it grants the VA authority to disclose information to the claimant's attorney; and
- f. Plaintiff provided this form to the VA with every correspondence. *Initial FOIA Request*, Exhibit 2; *Liaison Letter*, Exhibit 4; *FOIA Appeal*, Exhibit 5.

36. Because the undersigned Plaintiff's Representative was acting on Plaintiff's behalf, the VA has denied Plaintiff access to his own records, claiming that it was protecting Plaintiff from invading his own privacy.

37. When Plaintiff appealed, the Chief Counsel of the VA's Information & Administrative Law Group upheld the original VA determination, in a rubber-stamped manner. *Appeal Denial*, Exhibit 6.

38. In denying Plaintiff's FOIA request, the VA not only erred as a matter of law, it also acted in a manner that was arbitrary and capricious.

39. The VA's internal process for producing documents does not impose a deadline, nor does the Privacy Act. These two paths purport to allow the VA to take however long it chooses, often years, to produce documents to veterans like Plaintiff who seek to challenge VA benefit denials. However, FOIA requires a response within 20 days.

40. The VA abused Plaintiff, who filed a clear and proper FOIA request, it ignored the actual substance of Plaintiff's FOIA request, and then manufactured the thinnest pretext for denying Plaintiff's FOIA request, all in willful violation of federal law.

41. FOIA required the VA to produce Plaintiff's records by May 31, 2019, being 20 working days from the date of the request. By its actions, the VA has thus far successfully shunned its obligations under the law and bought itself an additional 69 days and counting.

42. Plaintiff seeks a declaratory judgment that FOIA entitles Plaintiff to the records he seeks as part of the his FOIA request to the VA.

43. Plaintiff has incurred attorneys' fees and litigation costs in bringing this action to seek his own records to which he is absolutely entitled.

44. Unless enjoined, made subject to a declaration of Plaintiff's legal rights, and made to pay attorneys' fees and costs by this Court, the VA will continue to violate the rights of Plaintiff and others similarly situated by maintaining its practice of unlawfully delaying, denying, and ignoring FOIA requests and appeals.

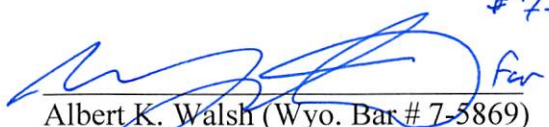
45. Reasonable attorneys' fees are warranted in this action. First, the VA imposed the fees and costs of this litigation on the Plaintiff through its unlawful actions. Second, merely ordering the VA to produce the records now will not be enough. If this Court does not award attorneys' fees and costs, it will send the agency a clear message that the VA can continue to deny valid FOIA requests with impunity.

V. Prayer for Relief

46. Plaintiff respectfully requests the Court:

- a. Order Defendants to provide true copies of all requested documents within 20 days of its order;
- b. Issue findings that the position of the United States Department of Veterans Affairs was not substantially justified, and that the agency acted in an arbitrary and capricious manner;
- c. Award Plaintiff costs and reasonable attorneys' fees in this action, as provided in 5 U.S.C. §552(a)(4)(E), 28 U.S.C. § 2412, and any other appropriate federal statute; and
- d. Such other relief as the Court deems just and appropriate, the premises considered.

RESPECTFULLY SUBMITTED this 8 day of August, 2019.

 # 7-4940
Albert K. Walsh (Wyo. Bar # 7-5869)
M. Gregory Weisz (Wyo. Bar # 6-2934)
Pence and MacMillan LLC
P.O. Box 1285
Laramie, WY 82073
Telephone: 307-745-3626
Fax: 307-745-8669
awalsh@penceandmac.com
gweisz@penceandmac.com
Attorneys for Plaintiff

APPOINTMENT OF INDIVIDUAL AS CLAIMANT'S REPRESENTATIVE

VA DATE STAMP
(DO NOT WRITE IN THIS SPACE)

NOTE: If you prefer to have a veterans service organization assist you with your claim instead of an individual please complete VA Form 21-22, *Appointment of Veterans Service Organization as Claimant's Representative*. When completed you can mail or fax this form to the appropriate intake center address shown on page 3. VA forms are available at www.va.gov/vaforms.

NOTE: You can *either* complete the form online or by hand. If completed by hand, print the information requested in ink, neatly, and legibly to expedite processing of the form.

[illegible]

4. VETERAN'S DATE OF BIRTH

$$- \begin{array}{|c|c|c|c|} \hline 9 & 9 & 6 & 4 \\ \hline \end{array}$$

9	9	6	4
---	---	---	---

Month Day Year
- 1 9 7 2

6. BRANCH OF SERVICE

☐ ARMY ☒ NAVY ☐ AIR FORCE ☐ MARINE CORPS ☐ COAST GUARD

☐ OTHER (Specify) _____

7. VETERAN'S MAILING ADDRESS (Number and street or rural route, city or P.O., State and ZIP Code)

[illegible]

Apt./Unit Number				
------------------	--	--	--	--

[illegible]

State/Province Country

ZIP Code/Postal Code 8 2 0 0 9 - 8 3 8 0

8. VETERAN'S TELEPHONE NUMBER (Include Area Code)

9. VETERAN'S EMAIL ADDRESS (Optional)

307-630-0136

robwhittecar@gmail.com

10. CLAIMANT'S NAME (First, Middle Initial, Last)

[illegible]

11. CLAIMANT'S MAILING ADDRESS (Number and street or rural route, city or P.O., State and ZIP Code)

[illegible]Ant / Unit Number

--	--	--	--	--

[illegible]

State/Province		Country	
----------------	--	---------	--

ZIP Code/Postal Code

--	--	--	--	--

 -

--	--	--	--	--

12. CLAIMANT'S TELEPHONE NUMBER (Include Area Code)

13. CLAIMANT'S EMAIL ADDRESS (Optional)

14. RELATIONSHIP TO VETERAN

15A. NAME OF INDIVIDUAL APPOINTED AS REPRESENTATIVE

Albert K. Walsh

15B. INDIVIDUAL IS (check appropriate box)

☒ ATTORNEY ☐ AGENT ☐ INDIVIDUAL PROVIDING REPRESENTATION ☐ SERVICE ORGANIZATION REPRESENTATIVE (Specify organization below)

*INDIVIDUALS PROVIDING REPRESENTATION UNDER SECTION 14.630

(Skip to Item 18, if the box for "Individual Providing Representation Under Section 14.630" was not checked in Item 15B)

The appointment of the individual named in Item 15A (the representative) authorizes that person to represent the individual named in Item 1 or 10 for a particular claim pursuant to the provisions of 38 CFR 14.630. By our signatures below, we, the representative and the veteran/claimant, attest that no compensation will be charged by or paid to the individual named in Item 15A.

16A. SIGNATURE OF REPRESENTATIVE NAMED IN ITEM 15A

16B. DATE OF SIGNATURE (MM/DD/YYYY)

17A. SIGNATURE OF INDIVIDUAL NAMED IN ITEM 1 OR 10

17B. DATE OF SIGNATURE (MM/DD/YYYY)

18. ADDRESS OF INDIVIDUAL APPOINTED AS CLAIMANT'S REPRESENTATIVE (Number and street or rural route, city or P.O., State, and ZIP code)

501 E. Garfield ST, Laramie, WY 82073

VETERAN'S SOCIAL SECURITY NO.

- 9 9 6 4

SECTION IV: AUTHORIZATION INFORMATION

19. AUTHORIZATION FOR REPRESENTATIVE'S ACCESS TO RECORDS PROTECTED BY SECTION 7332, TITLE 38, U.S.C. -

Unless I check the box below, I do not authorize VA to disclose to the individual named in Item 15A any records that may be in my file relating to treatment for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), or sickle cell anemia.

- ☒ I authorize the VA facility having custody of my VA claimant records to disclose to the individual named in Item 15A all treatment records relating to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), or sickle cell anemia. Redisclosure of these records by my representative, other than to VA or the Court of Appeals for Veterans Claims, is not authorized without my further written consent. This authorization will remain in effect until the earlier of the following events: (1) I revoke this authorization by filing a written revocation with VA; or (2) I revoke the appointment of the individual named in Item 15A, either by explicit revocation or the appointment of another representative.

20. LIMITATION OF CONSENT. My consent in Item 19 for the disclosure of records relating to treatment for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), or sickle cell anemia is limited as follows:

21. AUTHORIZATION FOR REPRESENTATIVE TO ACT ON CLAIMANT'S BEHALF TO CHANGE CLAIMANT'S ADDRESS -

Unless I check the box below, I do not authorize the individual named in Item 15A to act on my behalf to change my address in my VA records.

- ☒ I authorize the individual named in Item 15A to act on my behalf to change my address in my VA records. This authorization does not extend to any other individual without my further written consent. This authorization will remain in effect until the earlier of the following events: (1) I revoke this authorization by filing a written revocation with VA; or (2) I revoke the appointment of the individual named in Item 15A, either by explicit revocation or the appointment of another representative.

CONDITIONS OF APPOINTMENT

I, the person named in Item 1 or 10, hereby appoint the individual named in Item 15A as my representative to prepare, present, and prosecute my claims for any and all benefits from the Department of Veterans Affairs (VA) based on the service of the veteran named in Item 1. If the individual named in Item 15A is an accredited agent or attorney, the scope of representation provided before VA may be limited by the agent or attorney as indicated below in Item 23. If the individual indicated in Item 15A is providing representation under 14.630, such representation is limited to a particular claim only. I authorize VA to release any and all of my records (other than as provided in Items 19 and 20) to that individual appointed as my representative, and if the individual in Item 15A is an accredited agent or attorney, this authorization includes the following individually named administrative employees of my representative:

Signed and accepted subject to the foregoing conditions.

22A. SIGNATURE OF CLAIMANT (Do Not Print)

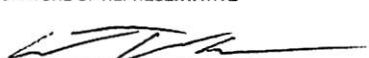


22B. DATE OF SIGNATURE (MM DD YYYY)

04/25/2019

23. LIMITATIONS ON REPRESENTATION - AGENTS OR ATTORNEYS ONLY (Unless limited by an agent or attorney, this power of attorney revokes all previously existing powers of attorney)

24A. SIGNATURE OF REPRESENTATIVE



24B. DATE OF SIGNATURE (MM DD YYYY)

4/25/19

FEES: Section 5904, Title 38, United States Code, contains provisions regarding fees that may be charged, allowed, or paid for services of agents or attorneys in connection with a proceeding before the Department of Veterans Affairs with respect to benefits under laws administered by the Department.

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement of a material fact, knowing it to be false or for the fraudulent acceptance of any payment to which you are not entitled.

PRIVACY ACT NOTICE: VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records -VA, published in the Federal Register. Your obligation to respond is voluntary. However, failure to respond provide the requested information could impede the recognition of your representative and/or identification of disclosable records. Except for information protected by 38 U.S.C. 7332, your representative is not prohibited from redisclosing records. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to recognize the individuals appointed by claimants to act on their behalf in the preparation, presentation, and prosecution of claims for VA benefits (38 U.S.C. 5902, 5903, and 5904) and for those individuals to accept appointment. We will also use the information to verify consent for disclosure of VA records to the appointed representative (38 U.S.C. 5701(b) and 7332) Title 38, United States Code, allows us to ask for this information. We estimate that claimants and individuals appointed for purposes of representation will each need an average of 5 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. A Valid OMB control number can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

Fax Call Report

HP Color LaserJet Flow E87640

Page 1

Fax Header Information

Pence and MacMillan
3077458669
May/2/2019 11:47:42 AM

Job	Date/Time	Type	Line	Identification	Duration	Pages	Result
1029	May/2/2019 11:44:40 AM	Send	Analog	18445317818	02:59	6	Success

May/2/2019 11:47:43 AM

English (United States)

W 0003

ALFRED M. PENCE (1905-1980)
 GEORGE J. MILLETT (1913-2003)
 GREG A. VON KROSIGK, P.C.
 M. GREGORY WEISZ, P.C.*
 DEVON O'CONNELL, P.C.*
 REBECCA A. LEWIS*
 MEGAN OVERMANN GOETZ, P.C.*
 JODI D. SHEA, P.C.
 COLE N. SHERARD, P.C.

DUSTIN J. RICHARDS*
 ISAIAH R. GROSS
 ALBERT K. WALSH
 MICHAEL J. PETERS**

H.M. "HOKE" MACMILLAN, RETIRED
 BECKY KLEMT MACMILLAN†, OF COUNSEL
 PAUL D. SCHIERER, RETIRED
 JEFFREY A. DONNELL, DISTRICT COURT JUDGE, RETIRED, OF COUNSEL

PENCE
and
MACMILLAN LLC
 Collaboration. Perspective. Experience.

ATTORNEYS AT LAW

OFFICES LOCATED IN:
 LARAMIE, WYOMING
 SHERIDAN, WYOMING
 CHEYENNE, WYOMING
 STEAMBOAT SPRINGS, COLORADO

SENDER'S ADDRESS:
 501 EAST GARFIELD ST.
 LARAMIE, WYOMING 82070
 P.O. BOX 1285
 LARAMIE, WYOMING 82073-1285
 O: 307-745-3626
 F: 307-745-8669
 WWW.PENCEANDMAC.COM
 AWALSH@PENCEANDMAC.COM

* ALSO ADMITTED IN COLORADO
 * ALSO ADMITTED IN ARIZONA
 **ALSO ADMITTED IN NEBRASKA AND OKLAHOMA

FAX

TO: Department of Veterans' Affairs
FAX NO.: 844-531-7818
From: Amber Ferguson, Paralegal to Albert K. Walsh
Date: 05/02/2019
RE: Freedom of Information Act Request

DOCUMENT(S) ENCLOSED:	NUMBER OF PAGES:
Freedom of Information Act Request	5

PAGES TRANSMITTED (including cover sheet): 6

COMMENTS:

XXXX Original will not follow _____ Original will follow by: US mail w/ fee
 _____ Please call upon receipt _____ Response need by: _____
 _____ For your approval/suggestions _____ Also sent by e-mail

CONFIDENTIALITY APPLIES IF THIS BOX IS CHECKED: ☒

The information contained in this facsimile message is information protected by attorney-client and/or the attorney/work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by facsimile. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

***IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT 307-745-3626**

ALFRED M. PENCE (1905-1980)
GEORGE J. MILLETT (1913-2003)
GREG A. VON KROSIGK, P.C.*
M. GREGORY WEISZ, P.C.*
DEVON O'CONNELL, P.C.*
REBECCA A. LEWIS*
MEGAN OVERMANN GOETZ, P.C.*
JODI D. SHEA, P.C.
COLE N. SHERARD, P.C.

DUSTIN J. RICHARDS*
ISAIAH R. GROSS
ALBERT K. WALSH
MICHAEL J. PETERS**

H.M. "HOKE" MACMILLAN, RETIRED
BECKY KLEMT MACMILLAN†, OF COUNSEL
PAUL D. SCHIERER, RETIRED
JEFFREY A. DONNELL, DISTRICT COURT JUDGE, RETIRED, OF COUNSEL



ATTORNEYS AT LAW

OFFICES LOCATED IN:
LARAMIE, WYOMING
SHERIDAN, WYOMING
CHEYENNE, WYOMING
STEAMBOAT SPRINGS, COLORADO

SENDER'S ADDRESS:
501 EAST GARFIELD ST.
LARAMIE, WYOMING 82070
P.O. BOX 1285
LARAMIE, WYOMING 82073-1285
O: 307-745-3626
F: 307-745-8669
WWW.PENCEANDMAC.COM
AWALSH@PENCEANDMAC.COM

* ALSO ADMITTED IN COLORADO
* ALSO ADMITTED IN ARIZONA
* ALSO ADMITTED IN NEBRASKA AND OKLAHOMA

FREEDOM OF INFORMATION ACT REQUEST

May 2, 2019

Department of Veterans' Affairs
Evidence Intake Center
FAX: 844-531-7818

RE: Freedom of Information Act Request
Veteran: Howard R. Whittecar
Veteran's VA File No: 9964
Veteran's Social Security Number: 9964

To Whom it May Concern:

This is a request for documents under 38 C.F.R. §1.577, the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, on behalf of Howard R. Whittecar (Veteran). Mr. Whittecar has appointed me as his representative as shown in the attached VA Form 21-22a. This request is properly made via facsimile as it contains the signature of the requester.

1. IDENTIFICATION OF DOCUMENTS.

I hereby request a copy of all documents contained in any VA claims folder for any of Veteran's VA claims, to include all documents in the right flap, left flap and center flap, and all electronic documents in any VBA file related to Veteran's Title 38 Claim(s), including by not limited to "Virtual VA", VBMS-A, VBMS-R, and VBMS-D, as well as any documentation pertaining to this Veteran and/or his/her VA claims and/or Appeals in AMIE/CAPRI/VGRIS/VACOLS, and/or in any other system of records in the BVA (or under contract with the VBA) used to preserve information (whether substantive, procedural, or meta-data) related to those records, wherever such records about the Veteran's claim are kept or stored by the VA

2. FORM/FORMAT IN WHICH TO PRODUCE INFORMATION.

The FOIA and the VA's own internal policies related to FOIA requests, require that the records be produced in the format sought by the requester, if the record is readily reproducible in that form or format.

I PREFER RECEIPT OF THESE RECORDS ON CD-R

Please take special care to ensure that both sides of any two-sided documents produced in response to this request are included in the response and are scanned into a PDF in such a way that they do not "bleed-through" from one side of the document to the other.

3. TIME FOR RESPONSE.

Please note that this request for documents is being made pursuant to the Privacy Act, 5 U.S.C. § 552, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552a, as well as 38 C.F.R. § 1.550 and 38 C.F.R. § 1.577. Your agency has a duty to respond to this request within TWENTY (20) BUSINESS DAYS of the date of this request pursuant to 5 U.S.C. § 552 (a)(6)(A)(2)(i).

Additionally, although an extension of time to respond may be requested, it may only be granted for "unusual circumstances." "Predictable agency workload" is not typically considered an unusual circumstance as stated in 5 U.S.C. § 552(a)(6)(C)(ii).

Moreover, even to the extent that unusual circumstances could be demonstrated in this instance, the time limit for the extension is limited to "10 working days" pursuant to 38 C.F.R. § 1.553(d).

Please also be aware that your agency's failure to respond to this request within twenty (20) business days can result in the filing of an administrative appeal with the office of the Secretary of the Department of Veterans Affairs pursuant to 38 C.F.R. § 1.557 and 5 U.S.C. § 552(a)(6)(A)(2)(ii), and/or, the filing of a federal lawsuit to compel the production of the information.

In any such appeal or lawsuit, I intend to seek not only injunctive and/or monetary relief related to this request, but to the extent permitted by law, injunctive and/or monetary relief based on the Department of Veteran's Affairs patterns and/or practices of responding to FOIA requests in a manner violative of the FOIA, as well as attorney fees and litigation expenses, and any other remedy/relief available at law.

4. POINT OF CONTACT.

As discussed above, please respond to this request within twenty (20) business days by mailing the CD to me at:

Albert Walsh
P.O. Box 1285
Laramie, WY 82073

If you have any questions or concerns about this request, please do not hesitate to contact me by phone at 307-745-3626 or email at awalsh@penceandmac.com. Thank you very much in advance for your assistance.

Sincerely,
Pence and MacMillan LLC



Albert K. Walsh
P.O. Box 1285
Laramie, Wyoming 82073
Telephone: 307-745-3626
Fax: 307-745-8669
awalsh@penceandmac.com
VA Accreditation # 45484
Wyoming State Bar #7-5869

AKW/af

VA FORM 21-22a
FEB 2019

VETERAN'S SOCIAL SECURITY NO.

- 9 9 6 4

SECTION IV: AUTHORIZATION INFORMATION

19. AUTHORIZATION FOR REPRESENTATIVE'S ACCESS TO RECORDS PROTECTED BY SECTION 7332, TITLE 38, U.S.C. -

Unless I check the box below, I do not authorize VA to disclose to the individual named in Item 15A any records that may be in my file relating to treatment for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), or sickle cell anemia.

- ☒ I authorize the VA facility having custody of my VA claimant records to disclose to the individual named in Item 15A all treatment records relating to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), or sickle cell anemia. Redisclosure of these records by my representative, other than to VA or the Court of Appeals for Veterans Claims, is not authorized without my further written consent. This authorization will remain in effect until the earlier of the following events: (1) I revoke this authorization by filing a written revocation with VA; or (2) I revoke the appointment of the individual named in Item 15A, either by explicit revocation or the appointment of another representative.

20. LIMITATION OF CONSENT. My consent in Item 19 for the disclosure of records relating to treatment for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), or sickle cell anemia is limited as follows:

21. AUTHORIZATION FOR REPRESENTATIVE TO ACT ON CLAIMANT'S BEHALF TO CHANGE CLAIMANT'S ADDRESS -

Unless I check the box below, I do not authorize the individual named in Item 15A to act on my behalf to change my address in my VA records.

- ☒ I authorize the individual named in Item 15A to act on my behalf to change my address in my VA records. This authorization does not extend to any other individual without my further written consent. This authorization will remain in effect until the earlier of the following events: (1) I revoke this authorization by filing a written revocation with VA; or (2) I revoke the appointment of the individual named in Item 15A, either by explicit revocation or the appointment of another representative.

CONDITIONS OF APPOINTMENT

I, the person named in Item 1 or 10, hereby appoint the individual named in Item 15A as my representative to prepare, present, and prosecute my claims for any and all benefits from the Department of Veterans Affairs (VA) based on the service of the veteran named in Item 1. If the individual named in Item 15A is an accredited agent or attorney, the scope of representation provided before VA may be limited by the agent or attorney as indicated below in Item 23. If the individual indicated in Item 15A is providing representation under 14.630, such representation is limited to a particular claim only. I authorize VA to release any and all of my records (other than as provided in Items 19 and 20) to that individual appointed as my representative, and if the individual in Item 15A is an accredited agent or attorney, this authorization includes the following individually named administrative employees of my representative:

Signed and accepted subject to the foregoing conditions.

22A. SIGNATURE OF CLAIMANT (Do Not Print)




22B. DATE OF SIGNATURE (MM DD YYYY)

04/25/2019

23. LIMITATIONS ON REPRESENTATION - AGENTS OR ATTORNEYS ONLY (Unless limited by an agent or attorney, this power of attorney revokes all previously existing powers of attorney)

24A. SIGNATURE OF REPRESENTATIVE



24B. DATE OF SIGNATURE (MM DD YYYY)

4/25/19

FEES: Section 5904, Title 38, United States Code, contains provisions regarding fees that may be charged, allowed, or paid for services of agents or attorneys in connection with a proceeding before the Department of Veterans Affairs with respect to benefits under laws administered by the Department.

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement of a material fact, knowing it to be false or for the fraudulent acceptance of any payment to which you are not entitled.

PRIVACY ACT NOTICE: VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records -VA, published in the Federal Register. Your obligation to respond is voluntary. However, failure to respond provide the requested information could impede the recognition of your representative and/or identification of disclosable records. Except for information protected by 38 U.S.C. 7332, your representative is not prohibited from redisclosing records. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to recognize the individuals appointed by claimants to act on their behalf in the preparation, presentation, and prosecution of claims for VA benefits (38 U.S.C. 5902, 5903, and 5904) and for those individuals to accept appointment. We will also use the information to verify consent for disclosure of VA records to the appointed representative (38 U.S.C. 5701(b) and 7332) Title 38, United States Code, allows us to ask for this information. We estimate that claimants and individuals appointed for purposes of representation will each need an average of 5 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. A Valid OMB control number can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.



DEPARTMENT OF VETERANS AFFAIRS
VA Records Management Center
4300 Goodfellow Blvd., Bldg. 104
St. Louis, MO 63120

May 13, 2019

PENCE AND MACMILLAN LLC
ALBERT WALSH
P.O. BOX 1285
LARAMIE, WY 82073

In reply, refer to:
376/LAB
File Number: 9964
HOWARD WHITTECAR

Re: Privacy Act Request
To Whom It May Concern:

This letter acknowledges receipt of your request for a copy of your or your client's Department of Veterans Affairs (VA) claims file or information contained therein, including service treatment records.

We have considered your request under both the Freedom of Information Act (FOIA), 5 U.S.C. §552 and the Privacy Act of 1974, 5 U.S.C. §552a. For the reasons outlined below, we are continuing to process your request under the Privacy Act; however, it is denied under FOIA.

Privacy Act

- The Privacy Act provides that records maintained by a federal agency about an individual that are retrieved by that individual's name or other unique identifier are confidential and may not be disclosed without the consent of the individual, unless one or more of twelve exceptions applies. 5 U.S.C. §552a(b). Generally, an agency shall provide an individual access to his or her record upon request. 5 U.S.C. §552a(d)(1).
- Unlike the FOIA, the Privacy Act does not impose a time for agency responses to access requests. Nonetheless, we generally process requests on a first in first out basis. Your request will be processed as soon as practicable.
- Should any portion of your request be denied, you will receive written notice and the reasons for any such denial.
- Pursuant to VA regulations implementing the Privacy Act access provision, you may file an administrative appeal only if you receive a written denial of your request from this office. 38 C.F.R. §1.580. Neither the Privacy Act nor VA's implementing regulations provide a right of action based upon a theory of constructive denial. Sussman v. DOJ, No. 03-3618, 2006 WL 2850608, at *5 (E.D.N.Y. Sept. 30, 2006).

Initial Agency Decision under FOIA

Page 2

File Number: 9964
WHITTECAR, HOWARD

- We have also thoroughly considered your request under the FOIA which provides that an agency must disclose federal records upon request unless one or more of nine statutory exemptions applies. 5 U.S.C. §552(b). Your request for a named Veteran's VA claims file is denied under FOIA Exemption 6.
- FOIA Exemption 6 protects records the release of which would lead to a clearly unwarranted invasion of a living individual's personal privacy. 5 U.S.C. § 552(b)(6).
- Living Veterans have an obvious privacy interest in their VA claims files that include social security numbers; dates of birth; and, financial, educational and medical information. The public disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. You have not identified and we do not find that public interest outweighs the privacy interest of a living Veteran in the information maintained in his or her VA claims records. Accordingly, the VA claims file you requested is denied under FOIA Exemption 6.
- We find that the information you seek is not reasonably segregable, e.g. the file cannot be effectively redacted to protect the privacy interest because your request seeks information about a named Veteran.
- While we understand your personal interest in the requested records, the Supreme Court has held that a requester's rights *under the FOIA* are neither increased nor decreased by the fact that he claims an interest in the requested records greater than that shared by the average member of the public. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975). Release to one individual *under FOIA* is release to all.
- For the reasons outlined above, your request is *denied under FOIA*.
- If you disagree with the determinations made in this response, please be advised you may appeal to the VA, Office of General Counsel. Appeals may be submitted electronically to their electronic appeal mailbox, ogcfoiaappeals@va.gov or mailed to the following address:

Office of General Counsel (024)
Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420

If you should choose to file an appeal, your appeal must be postmarked or electronically submitted no later than ninety (90) calendar days from the date of this letter. Please include a copy of this letter with your written appeal and clearly state why you disagree with the determinations set forth in this response.

Page 3

File Number: 9964
WHITTECAR, HOWARD

You may also seek assistance and/or dispute resolution services for any other aspect of your FOIA request, excluding the release determination, from VHA's FOIA Public Liaison and or Office of Government Information Services (OGIS) as provided below:

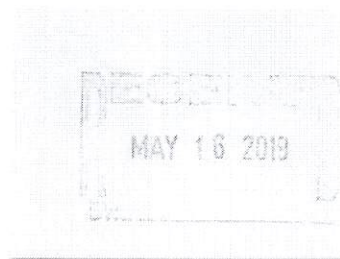
Office of Government Information Services	E-mail: ogis@nara.gov
National Archives and Records Administration	Telephone: 202-741-5770
Room 2510	Facsimile: 202-741-5769
8601 Adelphi Road	Toll-free: 1-877-684-6448
College Park, MD 20740-6001	

VA FOIA Public Liaison	E-mail: vacofoiaservice@va.gov
John Buck	Telephone: 1-877-750-3642
Acting Director, VA FOIA Service	Facsimile: 202-632-7581
810 Vermont Avenue, NW (005RIC)	
Washington, DC 20420	

Thank you for your interest in the Department of Veterans Affairs. Customer service is very important to us. If you have questions regarding this letter, please call the VA National Call Center at 1-800-827-1000 and refer to the assigned case number.

Sincerely yours,

Records Management Center Director



Fax Call Report

HP Color LaserJet Flow E87640

Page 1

Fax Header Information

Pence and MacMillan
3077458669
May/20/2019 3:50:13 PM

Job	Date/Time	Type	Line	Identification	Duration	Pages	Result
1072	May/20/2019 3:45:27 PM	Send	Analog	12026327581	04:42	13	Success

May/20/2019 3:50:14 PM

English (United States)

W 0014

ALFRED M. PENCE (1905-1980)
 GEORGE J. MILLETT (1913-2003)
 GREG A. VON KROSIGK, P.C.
 M. GREGORY WEISZ, P.C.*
 DEVON O'CONNELL, P.C.*
 REBECCA A. LEWIS*
 MEGAN OVERMANN GOETZ, P.C.*
 JODI D. SHEA, P.C.
 COLE N. SHERARD, P.C.

DUSTIN J. RICHARDS*
 ISAIAH R. GROSS
 ALBERT K. WALSH
 MICHAEL J. PETERS**

H.M. "HOKE" MACMILLAN, RETIRED
 BECKY KLEMT MACMILLAN†, OF COUNSEL
 PAUL D. SCHIERER, RETIRED
 JEFFREY A. DONNELL, DISTRICT COURT JUDGE, RETIRED, OF COUNSEL

PENCE and MACMILLAN LLC
 Collaboration. Perspective. Experience.

ATTORNEYS AT LAW

FAXED
 5/20/19 A

OFFICES LOCATED IN:
 LARAMIE, WYOMING
 SHERIDAN, WYOMING
 CHEYENNE, WYOMING
 STEAMBOAT SPRINGS, COLORADO

SENDER'S ADDRESS:
 501 EAST GARFIELD ST.
 LARAMIE, WYOMING 82070
 P.O. BOX 1285
 LARAMIE, WYOMING 82073-1285
 O: 307-745-3626
 F: 307-745-8669
 WWW.PENCEANDMAC.COM
 AWALSH@PENCEANDMAC.COM

* ALSO ADMITTED IN COLORADO
 * ALSO ADMITTED IN ARIZONA
 ** ALSO ADMITTED IN NEBRASKA AND OKLAHOMA

FAX

TO: Department of Veterans' Affairs
 FOIA Public Liaison – ATTENTION: Diane Cook
FAX NO.: 202-632-7581
From: Amber Ferguson, Paralegal to Albert K. Walsh
Date: 05/20/2019
RE: Follow up regarding Freedom of Information Act Request Denial

DOCUMENT(S) ENCLOSED:	NUMBER OF PAGES:
Letter and attachments from Mr. Walsh	12

PAGES TRANSMITTED (including cover sheet): 13

COMMENTS:

XXXX Original will not follow _____ Original will follow by: US mail w/ fee
 _____ Please call upon receipt _____ Response need by: _____
 _____ For your approval/suggestions _____ Also sent by e-mail

CONFIDENTIALITY APPLIES IF THIS BOX IS CHECKED: ☒ [X]

The information contained in this facsimile message is information protected by attorney-client and/or the attorney/work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by facsimile. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

*IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT 307-745-3626

ALFRED M. PENCE (1905-1980)
GEORGE J. MILLETT (1913-2003)
GREG A. VON KROSIGK, P.C.
M. GREGORY WEISZ, P.C.*
DEVON O'CONNELL, P.C.*
REBECCA A. LEWIS*
MEGAN OVERMANN GOETZ, P.C.*
JODI D. SHEA, P.C.
COLE N. SHERARD, P.C.

DUSTIN J. RICHARDS*
ISAIAH R. GROSS
ALBERT K. WALSH
MICHAEL J. PETERS*^

H.M. "HOKE" MACMILLAN, RETIRED
BECKY KLEMT MACMILLAN†, OF COUNSEL
PAUL D. SCHIERER, RETIRED
JEFFREY A. DONNELL, DISTRICT COURT JUDGE, RETIRED, OF COUNSEL

PENCE
MACMILLAN *and* **LLC**
Collaboration. Perspective. Experience.

ATTORNEYS AT LAW

OFFICES LOCATED IN:
LARAMIE, WYOMING
SHERIDAN, WYOMING
CHEYENNE, WYOMING
STEAMBOAT SPRINGS, COLORADO

SENDER'S ADDRESS:
501 EAST GARFIELD ST.
LARAMIE, WYOMING 82070
P.O. BOX 1285
LARAMIE, WYOMING 82073-1285
O: 307-745-3626
F: 307-745-8669
WWW.PENCEANDMAC.COM
AWALSH@PENCEANDMAC.COM

* ALSO ADMITTED IN COLORADO
† ALSO ADMITTED IN ARIZONA
^ ALSO ADMITTED IN NEBRASKA AND OKLAHOMA

May 20, 2019

Department of Veterans' Affairs
FOIA Public Liaison – ATTENTION: Diane Cook
FAX: 202-632-7581

RE: Follow up regarding Freedom of Information Act Request Denial
Veteran: Howard R. Whittecar
Veteran's VA File No: 9964
Veteran's Social Security Number: -9964

To Whom it May Concern:

The Veteran Howard R. Whittecar appointed me as his representative to assist with his claim for VA benefits. In that capacity I submitted a Freedom of Information Act Request, along with VA Form 21-22a seeking a copy of all documents contained in any VA claims folder for any of Veteran's VA claims. This request was submitted so I may properly advise the Veteran regarding his most recent denial letter. As I am sure you are well aware, the Veteran only has so much time to decide whether to appeal.

The FOIA request I submitted was denied and converted to a privacy act request. I believe that denial was an error. Additionally, since there are no deadlines associated with a Privacy Act request, the Veteran would risk waiting for documents that may come too late for his appeal. This is a risk he cannot take. For these reasons, I request that the Department of Veterans Affairs respond to the original FOIA request and provide the requested documents in the manner requested by June 18, 2019 in order to avoid the time and hassle of a FOIA appeal.

For your reference, I have enclosed the initial FOIA request and the subsequent denial letter. Thank you for your time and attention in this matter.

Sincerely,
Pence and MacMillan LLC



Albert K. Walsh
P.O. Box 1285
Laramie, Wyoming 82073
Telephone: 307-745-3626
Fax: 307-745-8669
awalsh@penceandmac.com
VA Accreditation # 45484
Wyoming State Bar #7-5869

AKW/af

Fax Call Report

HP Color LaserJet Flow E87640

Page 1

Fax Header Information

Pence and MacMillan
3077458669
Jun/19/2019 10:17:00 AM

Job	Date/Time	Type	Line	Identification	Duration	Pages	Result
1144	Jun/19/2019 10:11:21 AM	Send	Analog	18445317818	05:35	19	Success

Jun/19/2019 10:17:00 AM

English (United States)

W 0018

ALFRED M. PENCE (1905-1980)
 GEORGE J. MILLETT (1913-2003)
 GREG A. VON KROSIGK, P.C.
 M. GREGORY WEISZ, P.C.*
 DEVON O'CONNELL, P.C.*
 REBECCA A. LEWIS*
 MEGAN OVERMANN GOETZ, P.C.*
 JODI D. SHEA, P.C.
 COLE N. SHERARD, P.C.

DUSTIN J. RICHARDS*
 ISALAH R. GROSS
 ALBERT K. WALSH
 MICHAEL J. PETERS**

H.M. "HOKE" MACMILLAN, RETIRED
 BECKY KLEMT MACMILLAN†, OF COUNSEL
 PAUL D. SCHIERER, RETIRED
 JEFFREY A. DONNELL, DISTRICT COURT JUDGE, RETIRED, OF COUNSEL

PENCE
and
MACMILLAN LLC
 Collaboration. Perspective. Experience.

ATTORNEYS AT LAW

OFFICES LOCATED IN:
 LARAMIE, WYOMING
 SHERIDAN, WYOMING
 CHEYENNE, WYOMING
 STEAMBOAT SPRINGS, COLORADO

SENDER'S ADDRESS:
 501 EAST GARFIELD ST.
 LARAMIE, WYOMING 82070
 P.O. BOX 1285
 LARAMIE, WYOMING 82073-1285
 O: 307-745-3626
 F: 307-745-8669
 WWW.PENCEANDMAC.COM
 AWALSH@PENCEANDMAC.COM

* ALSO ADMITTED IN COLORADO
 * ALSO ADMITTED IN ARIZONA
 *ALSO ADMITTED IN NEBRASKA AND OKLAHOMA

FAX

TO: Department of Veterans Affairs
 Evidence Intake Center
FAX NO.: (844) 531-7818
From: Amber Ferguson, Paralegal to Albert K. Walsh
Date: June 19, 2019
RE: FREEDOM OF INFORMATION ACT APPEAL

DOCUMENT(S) ENCLOSED:	NUMBER OF PAGES:
FREEDOM OF INFORMATION ACT APPEAL WITH EXHIBITS	18

PAGES TRANSMITTED (including cover sheet): 19

COMMENTS:

XXXX Original will not follow _____ Original will follow by: US mail w/ fee
 _____ Please call upon receipt _____ Response need by: _____
 _____ For your approval/suggestions _____ Also sent by e-mail

CONFIDENTIALITY APPLIES IF THIS BOX IS CHECKED: ☒ [X]

The information contained in this facsimile message is information protected by attorney-client and/or the attorney/work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by facsimile. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

***IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT 307-745-3626**

Fax Call Report

HP Color LaserJet Flow E87640

Page 1

Fax Header Information

Pence and MacMillan
3077458669
Jun/19/2019 10:11:18 AM

Job	Date/Time	Type	Line	Identification	Duration	Pages	Result
1143	Jun/19/2019 10:05:06 AM	Send	Analog	13146793730	06:09	19	Success

Jun/19/2019 10:11:19 AM

English (United States)

W 0020

ALFRED M. PENCE (1905-1980)
 GEORGE J. MILLETT (1913-2003)
 GREG A. VON KROSIGK, P.C.
 M. GREGORY WEISZ, P.C.*
 DEVON O'CONNELL, P.C.*
 REBECCA A. LEWIS*
 MEGAN OVERMANN GOETZ, P.C.*
 JODI D. SHEA, P.C.
 COLE N. SHERARD, P.C.

DUSTIN J. RICHARDS*
 ISAIAH R. GROSS
 ALBERT K. WALSH
 MICHAEL J. PETERS**

H.M. "HOKE" MACMILLAN, RETIRED
 BECKY KLEMT MACMILLAN†, OF COUNSEL
 PAUL D. SCHIERER, RETIRED
 JEFFREY A. DONNELL, DISTRICT COURT JUDGE, RETIRED, OF COUNSEL

PENCE and MACMILLAN LLC
 Collaboration. Perspective. Experience.

ATTORNEYS AT LAW

OFFICES LOCATED IN:
 LARAMIE, WYOMING
 SHERIDAN, WYOMING
 CHEYENNE, WYOMING
 STEAMBOAT SPRINGS, COLORADO

SENDER'S ADDRESS:
 501 EAST GARFIELD ST.
 LARAMIE, WYOMING 82070
 P.O. BOX 1285
 LARAMIE, WYOMING 82073-1285
 O: 307-745-3626
 F: 307-745-8669
 WWW.PENCEANDMAC.COM
 AWALSH@PENCEANDMAC.COM

* ALSO ADMITTED IN COLORADO
 * ALSO ADMITTED IN ARIZONA
 **ALSO ADMITTED IN NEBRASKA AND OKLAHOMA

FAX

TO: Department of Veterans Affairs
 Record Management Center
FAX NO.: (314) 679-3730
From: Amber Ferguson, Paralegal to Albert K. Walsh
Date: June 19, 2019
RE: FREEDOM OF INFORMATION ACT APPEAL

DOCUMENT(S) ENCLOSED:	NUMBER OF PAGES:
FREEDOM OF INFORMATION ACT APPEAL WITH EXHIBITS	18

PAGES TRANSMITTED (including cover sheet): 19


COMMENTS:

XXXX Original will not follow _____ Original will follow by: US mail w/ fee
 _____ Please call upon receipt _____ Response need by: _____
 _____ For your approval/suggestions _____ Also sent by e-mail

CONFIDENTIALITY APPLIES IF THIS BOX IS CHECKED: ☒ [X]

The information contained in this facsimile message is information protected by attorney-client and/or the attorney/work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by facsimile. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

***IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT 307-745-3626**

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 		A. Signature X <input type="checkbox"/> Agent <input type="checkbox"/> Addressee	
1. Article Addressed to: <p style="text-align: center;">Department of Veterans Affairs Office of General Counsel 810 Vermont Ave. NW Washington, DC 20420</p>  9590 9403 0828 5215 5039 21		B. Received by (Printed Name) C. Date of Delivery D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
2. Article Number (Transfer from service label) 7016 1370 0000 9448 6592		3. Service Type <input type="checkbox"/> Adult Signature <input type="checkbox"/> Priority Mail Express® <input type="checkbox"/> Adult Signature Restricted Delivery <input type="checkbox"/> Registered Mail™ <input type="checkbox"/> Certified Mail® <input type="checkbox"/> Registered Mail Restricted Delivery <input type="checkbox"/> Certified Mail Restricted Delivery <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Collect on Delivery <input type="checkbox"/> Signature Confirmation™ <input type="checkbox"/> Collect on Delivery Restricted Delivery <input type="checkbox"/> Signature Confirmation Restricted Delivery <input type="checkbox"/> Insured Mail <input type="checkbox"/> Signature Confirmation Restricted Delivery <input type="checkbox"/> Insured Mail Restricted Delivery (D)	
PS Form 3811, April 2015 PSN 7530-02-000-9053		Domestic Return Receipt	

W 0022

UNITED STATES POSTAL SERVICE



First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4® in this box•

Pence and MacMillan LLC
Attorneys at Law
PO Box 1285- 501 E. Garfield
Laramie, WY 82073

USPS TRACKING#



9590 9403 0828 5215 5039 21

W 0023

ALFRED M. PENCE (1905-1980)
GEORGE J. MILLETT (1913-2003)
GREG A. VON KROSIGK, P.C.
M. GREGORY WEISZ, P.C.*
DEVON O'CONNELL, P.C.*
REBECCA A. LEWIS*
MEGAN OVERMANN GOETZ, P.C.*
JODI D. SHEA, P.C.
COLE N. SHERARD, P.C.

DUSTIN J. RICHARDS*
ISAIAH R. GROSS
ALBERT K. WALSH
MICHAEL J. PETERS**

H.M. "HOKE" MACMILLAN, RETIRED
BECKY KLEMT MACMILLAN†, OF COUNSEL
PAUL D. SCHIERER, RETIRED
JEFFREY A. DONNELL, DISTRICT COURT JUDGE, RETIRED, OF COUNSEL

PENCE
and
MACMILLAN LLC
Collaboration. Perspective. Experience.

ATTORNEYS AT LAW

MAILED
6/19/19

OFFICES LOCATED IN:
LARAMIE, WYOMING
SHERIDAN, WYOMING
CHEYENNE, WYOMING
STEAMBOAT SPRINGS, COLORADO

SENDER'S ADDRESS:
301 EAST GARFIELD ST.
LARAMIE, WYOMING 82070
P.O. BOX 1285
LARAMIE, WYOMING 82073-1285
O: 307-745-3626
F: 307-745-8669
WWW.PENCEANDMAC.COM
AWALSH@PENCEANDMAC.COM

* ALSO ADMITTED IN COLORADO
* ALSO ADMITTED IN ARIZONA
* ALSO ADMITTED IN NEBRASKA AND OKLAHOMA

FREEDOM OF INFORMATION ACT APPEAL

June 19, 2019

VIA FAX
Department of Veterans Affairs
Records Management Center
FAX: 314-679-3730

VIA FAX
Department of Veterans Affairs
Evidence Intake Center
FAX: 844-531-7818

VIA CERTIFIED MAIL (Return Receipt Requested)
Department of Veterans Affairs
Office of General Counsel
810 Vermont Ave, NW
Washington, DC 20420

RE: Freedom of Information Act Appeal
Veteran: Howard R. Whittecar
Veteran's VA File No: 9964
Veteran's Social Security Number: 9964

To Whom it May Concern:

This is an appeal under the Freedom of Information Act.

On May 2, 2019 I requested a complete copy the Claims File via fax under the Freedom of Information Act (FOIA). See Exhibit 1. The FOIA Request was received by the Evidence Intake Center on the same day. See Exhibit 1. The Records Management Center has not provided the requested documents in the time required by law.

ALFRED M. PENCE (1905-1980)
GEORGE J. MILLETT (1913-2003)
GREG A. VON KROSIGK, P.C.
M. GREGORY WEISZ, P.C.*
DEVON O'CONNELL, P.C.*
REBECCA A. LEWIS*
MEGAN OVERMANN GOETZ, P.C.*
JODI D. SHEA, P.C.
COLE N. SHERARD, P.C.

DUSTIN J. RICHARDS*
ISAIAH R. GROSS
ALBERT K. WALSH
MICHAEL J. PETERS*^

H.M. "HOKE" MACMILLAN, RETIRED
BECKY KLEMT MACMILLAN†, OF COUNSEL
PAUL D. SCHIERER, RETIRED
JEFFREY A. DONNELL, DISTRICT COURT JUDGE, RETIRED, OF COUNSEL



ATTORNEYS AT LAW

OFFICES LOCATED IN:
LARAMIE, WYOMING
SHERIDAN, WYOMING
CHEYENNE, WYOMING
STEAMBOAT SPRINGS, COLORADO

SENDER'S ADDRESS:
501 EAST GARFIELD ST.
LARAMIE, WYOMING 82070
P.O. BOX 1285
LARAMIE, WYOMING 82073-1285
O: 307-745-3626
F: 307-745-8669
WWW.PENCEANDMAC.COM
AWALSH@PENCEANDMAC.COM

* ALSO ADMITTED IN COLORADO
+ ALSO ADMITTED IN ARIZONA
^ALSO ADMITTED IN NEBRASKA AND OKLAHOMA

FREEDOM OF INFORMATION ACT APPEAL

June 19, 2019

VIA FAX
Department of Veterans Affairs
Records Management Center
FAX: 314-679-3730

VIA FAX
Department of Veterans Affairs
Evidence Intake Center
FAX: 844-531-7818

VIA CERTIFIED MAIL (Return Receipt Requested)
Department of Veterans Affairs
Office of General Counsel
810 Vermont Ave, NW
Washington, DC 20420

RE: Freedom of Information Act Appeal
Veteran: Howard R. Whittecar
Veteran's VA File No: 9964
Veteran's Social Security Number: 9964

To Whom it May Concern:

This is an appeal under the Freedom of Information Act.

On May 2, 2019 I requested a complete copy the Claims File via fax under the Freedom of Information Act (FOIA). See Exhibit 1. The FOIA Request was received by the Evidence Intake Center on the same day. See Exhibit 1. The Records Management Center has not provided the requested documents in the time required by law.

The Documents requested are necessary for the proper resolution of the Veteran's pending claim for VA benefits. The Department of Veterans Affairs is the Agency last known to have the particular documents requested which are relevant and material to the resolution of the Veteran's claim.

Records Management Center denied this request under 5. U.S.C. §522(b)(6) as a clearly unwarranted invasion of a living individual's personal privacy. See Exhibit 2. This is incorrect as the FOIA request included VA Form 21-22a signed by the Veteran appointing me as his representative. I made a good faith effort to avoid resorting to a FOIA Appeal by seeking assistance as suggested in the Denial Letter and corresponding with the VA FOIA Public Liaison in an effort to resolve this matter. See Exhibit 3. Those efforts were not successful.

This is an appeal of the VA's failure to produce documents lawfully requested under the FOIA. I am aware of no legitimate reason why the VA might withhold production of these records or why the VA would have failed to diligently search for the documents last known to be in its possession, control or custody.

An agency is required to make a determination on the merits of a FOIA appeal within 20 working days of receipt. 5 U.S.C. § 552(a)(6)(A)(ii).

Should the VA fail to respond to, or improperly deny, this appeal under the Freedom of Information Act, I am prepared to initiate a FOIA suit in the appropriate Federal District Court to compel disclosure of the documents, as well as any reasonable attorney fees and costs to which the Veteran might be entitled to under the law or in equity.

Thank you for your prompt consideration. Please feel free to contact me to discuss any aspect of this appeal.

Sincerely,
Pence and MacMillan LLC



Albert K. Walsh
P.O. Box 1285
Laramie, Wyoming 82073
Telephone: 307-745-3626
Fax: 307-745-8669
awalsh@penceandmac.com
VA Accreditation # 45484
Wyoming State Bar #7-5869

AKW/af

Enclosures:

- Exhibit 1 – FOIA Request with Fax Confirmation
- Exhibit 2 – Denial Letter
- Exhibit 3 – Letter to VA FOIA Public Liaison with Fax Confirmation¹

¹ This letter was sent to the VA FOIA Public Liaison along with all the documents included here as Exhibits 1 and 2. Those additional copies have been removed from Exhibit 3 in order to avoid confusion as well as unnecessary and burdensome duplication of documents.

Fax Call Report

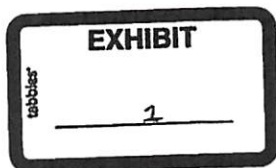
HP Color LaserJet Flow E87640

Page 1

Fax Header Information

Pence and MacMillan
3077458669
May/2/2019 11:47:42 AM

Job	Date/Time	Type	Line	Identification	Duration	Pages	Result
1029	May/2/2019 11:44:40 AM	Send	Analog	18445317818	02:59	6	Success



May/2/2019 11:47:43 AM

English (United States)

W 0028

ALFRED M. PENCE (1905-1980)
 GEORGE J. MILLETT (1913-2003)
 GREG A. VON KROSIGK, P.C.*
 M. GREGORY WEISZ, P.C.*
 DEVON O'CONNELL, P.C.*
 REBECCA A. LEWIS*
 MEGAN OVERMANN GOETZ, P.C.*
 JODI D. SHEA, P.C.
 COLE N. SHERARD, P.C.

DUSTIN J. RICHARDS*
 ISAIAH R. GROSS
 ALBERT K. WALSH
 MICHAEL J. PETERS**

H.M. "HOKE" MACMILLAN, RETIRED
 BECKY KLEMT MACMILLAN†, OF COUNSEL
 PAUL D. SCHIERER, RETIRED
 JEFFREY A. DONNELL, DISTRICT COURT JUDGE, RETIRED, OF COUNSEL

**PENCE and
 MACMILLAN LLC**
 Collaboration. Perspective. Experience.

ATTORNEYS AT LAW

OFFICES LOCATED IN:
 LARAMIE, WYOMING
 SHERIDAN, WYOMING
 CHEYENNE, WYOMING
 STEAMBOAT SPRINGS, COLORADO

SENDER'S ADDRESS:
 501 EAST GARFIELD ST.
 LARAMIE, WYOMING 82070
 P.O. BOX 1285
 LARAMIE, WYOMING 82073-1285
 O: 307-745-3626
 F: 307-745-8669
 WWW.PENCEANDMAC.COM
 AWALSH@PENCEANDMAC.COM

* ALSO ADMITTED IN COLORADO
 * ALSO ADMITTED IN ARIZONA
 ** ALSO ADMITTED IN NEBRASKA AND OKLAHOMA

FAX

TO: Department of Veterans' Affairs
 FAX NO.: 844-531-7818
 From: Amber Ferguson, Paralegal to Albert K. Walsh
 Date: 05/02/2019
 RE: Freedom of Information Act Request

DOCUMENT(S) ENCLOSED:	NUMBER OF PAGES:
Freedom of Information Act Request	5

PAGES TRANSMITTED (including cover sheet): 6

COMMENTS:

XXXX Original will not follow _____ Original will follow by: US mail w/ fee
 _____ Please call upon receipt _____ Response need by: _____
 _____ For your approval/suggestions _____ Also sent by e-mail

CONFIDENTIALITY APPLIES IF THIS BOX IS CHECKED: ☒

The information contained in this facsimile message is information protected by attorney-client and/or the attorney/work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by facsimile. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

*IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT 307-745-3626

ALFRED M. PENCE (1905-1980)
GEORGE J. MILLETT (1913-2003)
GREG A. VON KROSIGK, P.C.*
M. GREGORY WEISZ, P.C.*
DEVON O'CONNELL, P.C.*
REBECCA A. LEWIS*
MEGAN OVERMANN GOETZ, P.C.*
JODI D. SHEA, P.C.
COLE N. SHERARD, P.C.

DUSTIN J. RICHARDS*
ISAIAH F. GROSS
ALBERT K. WALSH
MICHAEL J. PETERS**

H.M. "HOKE" MACMILLAN, RETIRED
BECKY KLEMT MACMILLAN†, OF COUNSEL
PAUL D. SCHIERER, RETIRED
JEFFREY A. DONNELL, DISTRICT COURT JUDGE, RETIRED, OF COUNSEL

**PENCE
and
MACMILLAN** LLC
Collaboration. Perspective. Experience.

ATTORNEYS AT LAW

OFFICES LOCATED IN:
LARAMIE, WYOMING
SHERIDAN, WYOMING
CHEYENNE, WYOMING
STEAMBOAT SPRINGS, COLORADO

SENDER'S ADDRESS:
501 EAST GARFIELD ST.
LARAMIE, WYOMING 82070
P.O. BOX 1285
LARAMIE, WYOMING 82073-1285
O: 307-745-3626
F: 307-745-8669
WWW.PENCEANDMAC.COM
AWALSH@PENCEANDMAC.COM

* ALSO ADMITTED IN COLORADO
+ ALSO ADMITTED IN ARIZONA
** ALSO ADMITTED IN NEBRASKA AND OKLAHOMA

FREEDOM OF INFORMATION ACT REQUEST

May 2, 2019

Department of Veterans' Affairs
Evidence Intake Center
FAX: 844-531-7818

RE: Freedom of Information Act Request
Veteran: Howard R. Whittecar
Veteran's VA File No: 9964
Veteran's Social Security Number: 9964

To Whom it May Concern:

This is a request for documents under 38 C.F.R. §1.577, the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, on behalf of Howard R. Whittecar (Veteran). Mr. Whittecar has appointed me as his representative as shown in the attached VA Form 21-22a. This request is properly made via facsimile as it contains the signature of the requester.

1. IDENTIFICATION OF DOCUMENTS.

I hereby request a copy of all documents contained in any VA claims folder for any of Veteran's VA claims, to include all documents in the right flap, left flap and center flap, and all electronic documents in any VBA file related to Veteran's Title 38 Claim(s), including by not limited to "Virtual VA", VBMS-A, VBMS-R, and VBMS-D, as well as any documentation pertaining to this Veteran and/or his/her VA claims and/or Appeals in AMIE/CAPRI/VGRIS/VACOLS, and/or in any other system of records in the BVA (or under contract with the VBA) used to preserve information (whether substantive, procedural, or meta-data) related to those records, wherever such records about the Veteran's claim are kept or stored by the VA.

2. FORM/FORMAT IN WHICH TO PRODUCE INFORMATION.

The FOIA and the VA's own internal policies related to FOIA requests, require that the records be produced in the format sought by the requester, if the record is readily reproducible in that form or format.

I PREFER RECEIPT OF THESE RECORDS ON CD-R

Please take special care to ensure that both sides of any two-sided documents produced in response to this request are included in the response and are scanned into a PDF in such a way that they do not "bleed-through" from one side of the document to the other.

3. TIME FOR RESPONSE.

Please note that this request for documents is being made pursuant to the Privacy Act, 5 U.S.C. § 552, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552a, as well as 38 C.F.R. § 1.550 and 38 C.F.R. § 1.577. Your agency has a duty to respond to this request within TWENTY (20) BUSINESS DAYS of the date of this request pursuant to 5 U.S.C. § 552 (a)(6)(A)(2)(i).

Additionally, although an extension of time to respond may be requested, it may only be granted for "unusual circumstances." "Predictable agency workload" is not typically considered an unusual circumstance as stated in 5 U.S.C. § 552(a)(6)(C)(ii).

Moreover, even to the extent that unusual circumstances could be demonstrated in this instance, the time limit for the extension is limited to "10 working days" pursuant to 38 C.F.R. § 1.553(d).

Please also be aware that your agency's failure to respond to this request within twenty (20) business days can result in the filing of an administrative appeal with the office of the Secretary of the Department of Veterans Affairs pursuant to 38 C.F.R. § 1.557 and 5 U.S.C. § 552(a)(6)(A)(2)(ii), and/or, the filing of a federal lawsuit to compel the production of the information.

In any such appeal or lawsuit, I intend to seek not only injunctive and/or monetary relief related to this request, but to the extent permitted by law, injunctive and/or monetary relief based on the Department of Veteran's Affairs patterns and/or practices of responding to FOIA requests in a manner violative of the FOIA, as well as attorney fees and litigation expenses, and any other remedy/relief available at law.

4. POINT OF CONTACT.

As discussed above, please respond to this request within twenty (20) business days by mailing the CD to me at:

Albert Walsh
P.O. Box 1285
Laramie, WY 82073

If you have any questions or concerns about this request, please do not hesitate to contact me by phone at 307-745-3626 or email at awalsh@penceandmac.com. Thank you very much in advance for your assistance.


Sincerely,
Pence and MacMillan LLC



Albert K. Walsh
P.O. Box 1285
Laramie, Wyoming 82073
Telephone: 307-745-3626
Fax: 307-745-8669
awalsh@penceandmac.com
VA Accreditation # 45484
Wyoming State Bar #7-5869

AKW/af

OMB Control No. 2900-0321
Respondent Burden: 5 Minutes
Expiration Date: 02/28/2022

 Department of Veterans Affairs		VA DATE STAMP (DO NOT WRITE IN THIS SPACE)	
APPOINTMENT OF INDIVIDUAL AS CLAIMANT'S REPRESENTATIVE			
IMPORTANT: Please read the Privacy Act and Respondent Burden on Page 2 before completing the form.			
NOTE: If you prefer to have a veterans service organization assist you with your claim instead of an individual please complete VA Form 21-22, Appointment of Veterans Service Organization as Claimant's Representative. When completed you can mail or fax this form to the appropriate intake center address shown on page 3. VA forms are available at www.va.gov/vaforms .			
SECTION I: VETERAN'S INFORMATION			
NOTE: You can either complete the form online or by hand. If completed by hand, print the information requested in ink, neatly, and legibly to expedite processing of the form.			
1. VETERAN'S NAME (First, Middle Initial, Last) <div style="border: 1px solid black; padding: 2px;"> H o w a r d R W h i t t e c a r </div>			
2. VETERAN'S SOCIAL SECURITY NUMBER (SSN) <div style="border: 1px solid black; padding: 2px;"> - 9 9 6 4 </div>		3. VA FILE NUMBER (If applicable) <div style="border: 1px solid black; padding: 2px;"> 9 9 6 4 </div>	
4. VETERAN'S DATE OF BIRTH <div style="border: 1px solid black; padding: 2px;"> Month Day Year - - 1 9 7 2 </div>			
5. VETERAN'S SERVICE NUMBER (If applicable) <div style="border: 1px solid black; padding: 2px;"> - </div>		6. BRANCH OF SERVICE <input type="checkbox"/> ARMY <input checked="" type="checkbox"/> NAVY <input type="checkbox"/> AIR FORCE <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> COAST GUARD <input type="checkbox"/> OTHER (Specify)	
7. VETERAN'S MAILING ADDRESS (Number and street or rural route, city or P.O., State and ZIP Code) No. & Street: <div style="border: 1px solid black; padding: 2px;">7 3 0 0 Q u a r t e r C i r c l e D R</div> Apt/Unit Number: <div style="border: 1px solid black; padding: 2px;"> </div> City: <div style="border: 1px solid black; padding: 2px;">C h e y e n n e</div> State/Province: <div style="border: 1px solid black; padding: 2px;">W Y</div> Country: <div style="border: 1px solid black; padding: 2px;">U S</div> ZIP Code/Postal Code: <div style="border: 1px solid black; padding: 2px;">8 2 0 0 9 - 8 3 8 0</div>			
8. VETERAN'S TELEPHONE NUMBER (Include Area Code) 307-630-0136		9. VETERAN'S EMAIL ADDRESS (Optional) robwhittecarr@gmail.com	
SECTION II: CLAIMANT'S INFORMATION (If other than veteran)			
10. CLAIMANT'S NAME (First, Middle Initial, Last) <div style="border: 1px solid black; padding: 2px;"> - </div>			
11. CLAIMANT'S MAILING ADDRESS (Number and street or rural route, city or P.O., State and ZIP Code) No. & Street: <div style="border: 1px solid black; padding: 2px;"> </div> Apt/Unit Number: <div style="border: 1px solid black; padding: 2px;"> </div> City: <div style="border: 1px solid black; padding: 2px;"> </div> State/Province: <div style="border: 1px solid black; padding: 2px;"> </div> Country: <div style="border: 1px solid black; padding: 2px;"> </div> ZIP Code/Postal Code: <div style="border: 1px solid black; padding: 2px;"> </div>			
12. CLAIMANT'S TELEPHONE NUMBER (Include Area Code)		13. CLAIMANT'S EMAIL ADDRESS (Optional)	
		14. RELATIONSHIP TO VETERAN	
SECTION III: SERVICE ORGANIZATION INFORMATION			
15A. NAME OF INDIVIDUAL APPOINTED AS REPRESENTATIVE Albert K. Walsh			
15B. INDIVIDUAL IS (check appropriate box) <input checked="" type="checkbox"/> ATTORNEY <input type="checkbox"/> AGENT <input type="checkbox"/> INDIVIDUAL PROVIDING REPRESENTATION UNDER SECTION 14.630 (See required statement below. Signatures are required in Items 16A and 17A) <input type="checkbox"/> SERVICE ORGANIZATION REPRESENTATIVE (Specify organization below)			
*INDIVIDUALS PROVIDING REPRESENTATION UNDER SECTION 14.630 (Skip to Item 18, if the box for "Individual Providing Representation Under Section 14.630" was not checked in Item 15B)			
The appointment of the individual named in Item 15A (the representative) authorizes that person to represent the individual named in Item 1 or 10 for a particular claim pursuant to the provisions of 38 CFR 14.630. By our signatures below, we, the representative and the veteran/claimant, attest that no compensation will be charged by or paid to the individual named in Item 15A.			
16A. SIGNATURE OF REPRESENTATIVE NAMED IN ITEM 15A		16B. DATE OF SIGNATURE (MM/DD/YYYY)	
17A. SIGNATURE OF INDIVIDUAL NAMED IN ITEM 1 OR 10		17B. DATE OF SIGNATURE (MM/DD/YYYY)	
18. ADDRESS OF INDIVIDUAL APPOINTED AS CLAIMANT'S REPRESENTATIVE (Number and street or rural route, city or P.O., State, and ZIP code) 501 E. Garfield ST, Laramie, WY 82073			

VA FORM
FEB 2019 **21-22a**

SUPERSEDES VA FORM 21-22a, AUG 2015.

Page 1

VETERAN'S SOCIAL SECURITY NO.

- 9 9 6 4

SECTION IV: AUTHORIZATION INFORMATION

19. AUTHORIZATION FOR REPRESENTATIVE'S ACCESS TO RECORDS PROTECTED BY SECTION 7332, TITLE 38, U.S.C. -

Unless I check the box below, I do not authorize VA to disclose to the individual named in Item 15A any records that may be in my file relating to treatment for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), or sickle cell anemia.

- ☒ I authorize the VA facility having custody of my VA claimant records to disclose to the individual named in Item 15A all treatment records relating to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), or sickle cell anemia. Redisclosure of these records by my representative, other than to VA or the Court of Appeals for Veterans Claims, is not authorized without my further written consent. This authorization will remain in effect until the earlier of the following events: (1) I revoke this authorization by filing a written revocation with VA; or (2) I revoke the appointment of the individual named in Item 15A, either by explicit revocation or the appointment of another representative.

20. LIMITATION OF CONSENT. My consent in Item 19 for the disclosure of records relating to treatment for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), or sickle cell anemia is limited as follows:

21. AUTHORIZATION FOR REPRESENTATIVE TO ACT ON CLAIMANT'S BEHALF TO CHANGE CLAIMANT'S ADDRESS -

Unless I check the box below, I do not authorize the individual named in Item 15A to act on my behalf to change my address in my VA records.

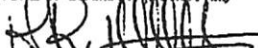
- ☒ I authorize the individual named in Item 15A to act on my behalf to change my address in my VA records. This authorization does not extend to any other individual without my further written consent. This authorization will remain in effect until the earlier of the following events: (1) I revoke this authorization by filing a written revocation with VA; or (2) I revoke the appointment of the individual named in Item 15A, either by explicit revocation or the appointment of another representative.

CONDITIONS OF APPOINTMENT

I, the person named in Item 1 or 10, hereby appoint the individual named in Item 15A as my representative to prepare, present, and prosecute my claims for any and all benefits from the Department of Veterans Affairs (VA) based on the service of the veteran named in Item 1. If the individual named in Item 15A is an accredited agent or attorney, the scope of representation provided before VA may be limited by the agent or attorney as indicated below in Item 23. If the individual indicated in Item 15A is providing representation under 14.630, such representation is limited to a particular claim only. I authorize VA to release any and all of my records (other than as provided in Items 19 and 20) to that individual appointed as my representative, and if the individual in Item 15A is an accredited agent or attorney, this authorization includes the following individually named administrative employees of my representative:

Signed and accepted subject to the foregoing conditions.

22A. SIGNATURE OF CLAIMANT (Do Not Print)



22B. DATE OF SIGNATURE (MM/DD/YYYY)

04/25/2019

23. LIMITATIONS ON REPRESENTATION - AGENTS OR ATTORNEYS ONLY (Unless limited by an agent or attorney, this power of attorney revokes all previously existing powers of attorney)

24A. SIGNATURE OF REPRESENTATIVE



24B. DATE OF SIGNATURE (MM/DD/YYYY)

4/25/19

FEES: Section 5904, Title 38, United States Code, contains provisions regarding fees that may be charged, allowed, or paid for services of agents or attorneys in connection with a proceeding before the Department of Veterans Affairs with respect to benefits under laws administered by the Department.

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement of a material fact, knowing it to be false or for the fraudulent acceptance of any payment to which you are not entitled.

PRIVACY ACT NOTICE: VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/23, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records -VA, published in the Federal Register. Your obligation to respond is voluntary. However, failure to respond provides the requested information could impede the recognition of your representative and/or identification of disclosable records. Except for information protected by 38 U.S.C. 7332, your representative is not prohibited from redisclosing records. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to recognize the individuals appointed by claimants to act on their behalf in the preparation, presentation, and prosecution of claims for VA benefits (38 U.S.C. 5902, 5903, and 5904) and for those individuals to accept appointment. We will also use the information to verify consent for disclosure of VA records to the appointed representative (38 U.S.C. 5701(b) and 7332) Title 38, United States Code, allows us to ask for this information. We estimate that claimants and individuals appointed for purposes of representation will each need an average of 5 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. A valid OMB control number can be located on the OMB Internet Page at: www.reginfo.gov/public/default.do?P=TRANSLATE. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.



DEPARTMENT OF VETERANS AFFAIRS
VA Records Management Center
4300 Goodfellow Blvd., Bldg. 104
St. Louis, MO 63120

May 13, 2019

PENCE AND MACMILLAN LLC
ALBERT WALSH
P.O. BOX 1285
LARAMIE, WY 82073

In reply, refer to:
376/LAB
File Number: 9964
HOWARD WHITECAR

Re: Privacy Act Request
To Whom It May Concern:

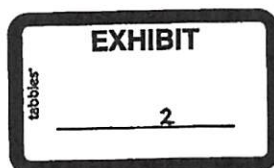
This letter acknowledges receipt of your request for a copy of your or your client's Department of Veterans Affairs (VA) claims file or information contained therein, including service treatment records.

We have considered your request under both the Freedom of Information Act (FOIA), 5 U.S.C. §552 and the Privacy Act of 1974, 5 U.S.C. §552a. For the reasons outlined below, we are continuing to process your request under the Privacy Act; however, it is denied under FOIA.

Privacy Act

- The Privacy Act provides that records maintained by a federal agency about an individual that are retrieved by that individual's name or other unique identifier are confidential and may not be disclosed without the consent of the individual, unless one or more of twelve exceptions applies. 5 U.S.C. §552a(b). Generally, an agency shall provide an individual access to his or her record upon request. 5 U.S.C. §552a(d)(1).
- Unlike the FOIA, the Privacy Act does not impose a time for agency responses to access requests. Nonetheless, we generally process requests on a first in first out basis. Your request will be processed as soon as practicable.
- Should any portion of your request be denied, you will receive written notice and the reasons for any such denial.
- Pursuant to VA regulations implementing the Privacy Act access provision, you may file an administrative appeal only if you receive a written denial of your request from this office. 38 C.F.R. §1.580. Neither the Privacy Act nor VA's implementing regulations provide a right of action based upon a theory of constructive denial. Sussman v. DOJ, No. 03-3618, 2006 WL 2850608, at *5 (E.D.N.Y. Sept. 30, 2006).

Initial Agency Decision under FOIA



Page 2

File Number: 9964
WHITTECAR, HOWARD

- We have also thoroughly considered your request under the FOIA which provides that an agency must disclose federal records upon request unless one or more of nine statutory exemptions applies. 5 U.S.C. §552(b). Your request for a named Veteran's VA claims file is denied under FOIA Exemption 6.
- FOIA Exemption 6 protects records the release of which would lead to a clearly unwarranted invasion of a living individual's personal privacy. 5 U.S.C. § 552(b)(6).
- Living Veterans have an obvious privacy interest in their VA claims files that include social security numbers; dates of birth; and, financial, educational and medical information. The public disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. You have not identified and we do not find that public interest outweighs the privacy interest of a living Veteran in the information maintained in his or her VA claims records. Accordingly, the VA claims file you requested is denied under FOIA Exemption 6.
- We find that the information you seek is not reasonably segregable, e.g. the file cannot be effectively redacted to protect the privacy interest because your request seeks information about a named Veteran.
- While we understand your personal interest in the requested records, the Supreme Court has held that a requester's rights *under the FOIA* are neither increased nor decreased by the fact that he claims an interest in the requested records greater than that shared by the average member of the public. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975). Release to one individual *under FOIA* is release to all.
- For the reasons outlined above, your request is *denied under FOIA*.
- If you disagree with the determinations made in this response, please be advised you may appeal to the VA, Office of General Counsel. Appeals may be submitted electronically to their electronic appeal mailbox, ogcfoiaappeals@va.gov or mailed to the following address:

Office of General Counsel (024)
Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420

If you should choose to file an appeal, your appeal must be postmarked or electronically submitted no later than ninety (90) calendar days from the date of this letter. Please include a copy of this letter with your written appeal and clearly state why you disagree with the determinations set forth in this response.

Page 3

File Number: 9964
WHITTECAR, HOWARD

You may also seek assistance and/or dispute resolution services for any other aspect of your FOIA request, excluding the release determination, from VHA's FOIA Public Liaison and or Office of Government Information Services (OGIS) as provided below:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

E-mail: ogis@nara.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

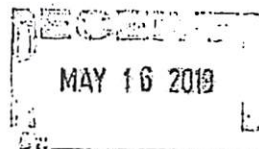
VA FOIA Public Liaison
John Buck
Acting Director, VA FOIA Service
810 Vermont Avenue, NW (005RIC)
Washington, DC 20420

E-mail: vacofoiaservice@va.gov
Telephone: 1-877-750-3642
Facsimile: 202-632-7581

Thank you for your interest in the Department of Veterans Affairs. Customer service is very important to us. If you have questions regarding this letter, please call the VA National Call Center at 1-800-827-1000 and refer to the assigned case number.

Sincerely yours,

Records Management Center Director



Fax Call Report

HP Color LaserJet Flow E87640

Page 1

Fax Header Information

Pence and MacMillan
3077458669
May/20/2019 3:50:13 PM

Job	Date/Time	Type	Line	Identification	Duration	Pages	Result
1072	May/20/2019 3:45:27 PM	Send	Analog	12026327581	04:42	13	Success

EXHIBIT

tabbles

3

May/20/2019 3:50:14 PM

English (United States)

W 0039

ALFRED M. PENCE (1905-1980)
 GEORGE J. MILLETT (1913-2003)
 GREG A. VON KROSIGK, P.C.*
 M. GREGORY WEISZ, P.C.*
 DEVON O'CONNELL, P.C.*
 REBECCA A. LEWIS*
 MEGAN OVERMANN GOETZ, P.C.*
 JODI D. SHEA, P.C.
 COLE N. SHERARD, P.C.

DUSTIN J. RICHARDS*
 ISAIAH R. GROSS
 ALBERT K. WALSH
 MICHAEL J. PETERS**

H.M. "HOKE" MACMILLAN, RETIRED
 BECKY KLEMT MACMILLAN, OF COUNSEL
 PAUL D. SCHIERER, RETIRED
 JEFFREY A. DONNELL, DISTRICT COURT JUDGE, RETIRED, OF COUNSEL

PENCE and MACMILLAN LLC
 Collaboration. Perspective. Experience.

ATTORNEYS AT LAW

FAXED
 5/20/19 AF

OFFICES LOCATED IN:
 LARAMIE, WYOMING
 SHERIDAN, WYOMING
 CHEYENNE, WYOMING
 STEAMBOAT SPRINGS, COLORADO

SENDER'S ADDRESS:
 501 EAST GARFIELD ST.
 LARAMIE, WYOMING 82070
 P.O. BOX 1285
 LARAMIE, WYOMING 82073-1285
 O: 307-745-3626
 F: 307-745-8669
 WWW.PENCEANDMAC.COM
 AWALSH@PENCEANDMAC.COM

* ALSO ADMITTED IN COLORADO
 * ALSO ADMITTED IN ARIZONA
 **ALSO ADMITTED IN NEBRASKA AND OKLAHOMA

FAX

TO: Department of Veterans' Affairs
 FOIA Public Liaison – ATTENTION: Diane Cook
FAX NO.: 202-632-7581
From: Amber Ferguson, Paralegal to Albert K. Walsh
Date: 05/20/2019
RE: Follow up regarding Freedom of Information Act Request Denial

DOCUMENT(S) ENCLOSED:	NUMBER OF PAGES:
Letter and attachments from Mr. Walsh	12

PAGES TRANSMITTED (including cover sheet): 13

COMMENTS:

XXXX Original will not follow _____ Original will follow by: US mail w/ fee
 _____ Please call upon receipt _____ Response need by: _____
 _____ For your approval/suggestions _____ Also sent by e-mail

CONFIDENTIALITY APPLIES IF THIS BOX IS CHECKED: ☒

The information contained in this facsimile message is information protected by attorney-client and/or the attorney/work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by facsimile. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

*IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT 307-745-3626

ALFRED M. PENCE (1905-1980)
GEORGE J. MILLETT (1913-2003)
GREG A. VON KROSIGK, P.C.
M. GREGORY WEISZ, P.C.*
DEVON O'CONNELL, P.C.*
REBECCA A. LEWIS*
MEGAN OVERMANN GOETZ, P.C.*
JODI D. SHEA, P.C.
COLE N. SHERARD, P.C.

DUSTIN J. RICHARDS*
ISAIAH R. GROSS
ALBERT K. WALSH
MICHAEL J. PETERS**

H.M. "HOKE" MACMILLAN, RETIRED
BECKY KLEMT MACMILLAN, OF COUNSEL
PAUL D. SCHIERER, RETIRED
JEFFREY A. DONNELL, DISTRICT COURT JUDGE, RETIRED, OF COUNSEL

PENCE
MACMILLAN *and* **LLC**
Collaboration. Perspective. Experience.

ATTORNEYS AT LAW

OFFICES LOCATED IN:
LARAMIE, WYOMING
SHERIDAN, WYOMING
CHEYENNE, WYOMING
STEAMBOAT SPRINGS, COLORADO

SENDER'S ADDRESS:
501 EAST GARFIELD ST.
LARAMIE, WYOMING 82070
P.O. BOX 1285
LARAMIE, WYOMING 82073-1285
O: 307-745-3626
F: 307-745-8669
WWW.PENCEANDMAC.COM
AWALSH@PENCEANDMAC.COM

* ALSO ADMITTED IN COLORADO
* ALSO ADMITTED IN ARIZONA
** ALSO ADMITTED IN NEBRASKA AND OKLAHOMA

May 20, 2019

Department of Veterans' Affairs
FOIA Public Liaison – ATTENTION: Diane Cook
FAX: 202-632-7581

RE: Follow up regarding Freedom of Information Act Request Denial
Veteran: Howard R. Whittecar
Veteran's VA File No: 9964
Veteran's Social Security Number: 9964

To Whom it May Concern:

The Veteran Howard R. Whittecar appointed me as his representative to assist with his claim for VA benefits. In that capacity I submitted a Freedom of Information Act Request, along with VA Form 21-22a seeking a copy of all documents contained in any VA claims folder for any of Veteran's VA claims. This request was submitted so I may properly advise the Veteran regarding his most recent denial letter. As I am sure you are well aware, the Veteran only has so much time to decide whether to appeal.

The FOIA request I submitted was denied and converted to a privacy act request. I believe that denial was an error. Additionally, since there are no deadlines associated with a Privacy Act request, the Veteran would risk waiting for documents that may come too late for his appeal. This is a risk he cannot take. For these reasons, I request that the Department of Veterans Affairs respond to the original FOIA request and provide the requested documents in the manner requested by June 18, 2019 in order to avoid the time and hassle of a FOIA appeal.

For your reference, I have enclosed the initial FOIA request and the subsequent denial letter. Thank you for your time and attention in this matter.

Sincerely,
Pence and MacMillan LLC



Albert K. Walsh
P.O. Box 1285
Laramie, Wyoming 82073
Telephone: 307-745-3626
Fax: 307-745-8669
awalsh@penceandmac.com
VA Accreditation # 45484
Wyoming State Bar #7-5869

AKW/af



Office of the General Counsel
Washington DC 20420

In Reply Refer To: IALG/024
OGC Case #: 134069

July 1, 2019

Albert K. Walsh
Attorney at Law
Pence and MacMillan, LLC
P.O. Box 1285
Laramie, WY 82073

- RE: Howard R. Whittecar

Dear Mr. Walsh:

This letter is the final administrative decision issued under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, in response to your appeal from the failure of the Department of Veterans Affairs (VA), Veterans Benefits Administration (VBA) Records Management Center (RMC) in St. Louis, MO to respond to your request.

Your appeal is denied for the reasons outlined below under the FOIA and is remanded to the RMC for an initial agency decision under the Privacy Act.

Procedural History
Initial Request

- On May 2, 2019, you submitted a request to the VA Evidence Intake Center for a copy of the above-named Veteran VA claims file (C-file).

Initial Agency Decision

- To date, the RMC has not provided you with an Initial Agency Decision to include the requested records.

Appeal

- On June 26, 2019, you appealed to our office advising that the RMC had not responded to your request for records.

Responsive Records

- The above-referenced Veteran VA C-file

Relevant Law

We have thoroughly reviewed your submission under the provisions of the FOIA, which provides that federal agencies must disclose records requested unless they may be withheld in accordance with one or more of nine statutory exemptions. 5 U.S.C. § 552(b). We have also reviewed your request under the provisions of the Privacy Act of 1974 Privacy Act of 1974, 5 U.S.C. §552a, and VA's implementing regulations.

Analysis

FOIA

With respect to the reasons for submitting your appeal, we note that the Supreme Court has held that a requester's rights under the FOIA are neither increased nor decreased by reason of the fact that he claims an interest in the requested records greater than that shared by the average member of the public. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975). Accordingly, your request for a copy of the Veteran's VA C-file is denied under FOIA Exemption 6.

FOIA Exemption 6 protects records the release of which would lead to a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). In United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), the Supreme Court provided the following step-by-step analysis to determine when the exemptions apply to a case: (1) determine whether a personal privacy interest is involved; (2) determine whether disclosure would serve the public interest; and (3) balance the personal privacy interest against the public interest. The Veteran has a privacy interest in the information maintained in his VA C-file. VA C-files are part of a Privacy Act system of record identified as 58VA21, 22, 28 – Compensation, Pension, Education, and Rehabilitation, which includes Veteran and beneficiary names, social security numbers, dates of birth, financial information, educational information, and medical records. The disclosure of such sensitive personal identifiable information (PII) and personal health information (PHI) would clearly constitute an unwarranted invasion of the Veteran's personal privacy. See Reporter's Committee at 771 (the requester's identity has no bearing on the merits of the request); Forest Serv. Employees for Evtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1025 (9th Cir. 2008) (release to one is release to all); and, NARA v. Favish, 541 U.S. 157, 174 (once information is disclosed it belongs to the public).

While the release of this information may be permissible if it would serve an articulable and significant public interest, you have not identified a public interest in the information contained in the Veteran's VA C-file. Under the circumstances, the balance weighs in favor of protecting the Veteran's privacy interest in his VA records. We find that records you seek are protected from disclosure under FOIA Exemption 6. The FOIA requires that we consider whether information that is subject to withhold under FOIA Exemption 6 can be redacted. Unfortunately, because your request relates to a named individual, there is no way to redact the responsive record and protect the Veteran's privacy. Accordingly, your appeal under FOIA is denied.

Privacy Act

The Privacy Act provides that an agency shall "upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence".

VA's regulations implementing the Privacy Act provide that "upon denial [of] a request [for access or amendment] under 38 CFR 1.577 or 1.579, the responsible Department of Veterans Affairs official or designated employee will inform the requester in writing of the denial, cite the reason or reasons and the Department of Veterans Affairs regulations upon which the denial is based, and advise that the denial may be appealed to the General Counsel." 38 C.F.R. §1.580.

You provided a consent form, signed by the Veteran authorizing VBA to disclose the VA C-file to you for purposes of pursuing claims of entitlement to benefits administered under Title 38 of the United States Code by the Secretary of Veterans Affairs. As noted above and in your appeal, RMC has not responded to your request.

We find that your appeal is premature inasmuch as you have not received a written denial of your request. 38 C.F.R. §1.580. Accordingly, we are remanding your request back to RMC. That office should acknowledge receipt of your request if they have not already done so, and communicate to you a date upon which it is estimated that your request will be processed under the Privacy Act. Ultimately, if RMC denies your request, you should be advised of such in writing as soon as practicable and provided notice of your right to appeal any negative determinations to this office.

Conclusion

For the reasons discussed above, your request for a copy of the above-named Veteran VA C-file is denied under the FOIA.

However, your request is being remanded back to the RMC for a decision under the access provision of the Privacy Act and VA's implementing regulations. The RMC will provide you with a copy of the C-File under the Privacy Act.

Mediation/Appeal Rights

This final agency decision concludes the administrative processing of your requests referred to above. As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services. Similarly, as part of the FOIA Improvement Act of 2016, VA established a FOIA Public Liaison to offer mediation services. Both OGIS and the VA Public Liaison will assist in resolving disputes between FOIA requesters and VA as a non-exclusive alternative to litigation. Using OGIS or the VA FOIA Public Liaison does not affect your right to pursue litigation. You may contact OGIS or the VA Public Liaison in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

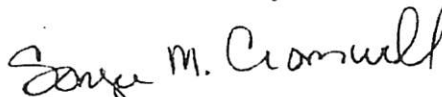
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

VA FOIA Public Liaison
John Buck
Acting Director, VA FOIA Service
810 Vermont Avenue, NW (005R1C)
Washington, DC 20420

E-mail: vacofoiaservice@va.gov
Telephone: 1-877-750-3642
Facsimile: 202-632-7581

With respect to any information denied to you by this final agency decision, the FOIA requires us to advise you that if you believe the Department erred in this decision, you have the right to file a complaint in an appropriate United States District Court.

Sincerely,



Sonya M. Cromwell
Chief Counsel, Information & Administrative Law Group

cc: Richard Ivy, FOIA/PA Officer – VA Records Management Center

